ITEM 1008-D X96-2: H.Rp. 831/pt.2

96TH CONGRESS, 2d Session } HOUSE OF REPRESENTATIVES { REPT. 96-831, Part 2

CLASSIFIED INFORMATION CRIMINAL TRIAL PROCEDURES ACT

SEPTEMBER 17, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. EDWARDS of California, from the Committee on the Judiciary, submitted the following

COMPLETED ORIGINAL

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany H.R. 4736 which on July 11, 1979, was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4736) to establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in boldface roman type in the reported bill.

BACKGROUND AND NEED FOR LEGISLATION

In recent years, there have been a number of highly publicized criminal cases in which the disclosure of sensitive classified information has been an issue. Such cases include but are not limited to traditional espionage trials,[1] as well as cases involving alleged wrongdoing by government officials.[2]

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[1] *U.S.* v. *Berrellez*, (D.D.C. Crim. No. 78-120); *U.S.* v. *Humphrey and Truong* (E.D. Va. Crim. No. 78-25-A); *U.S.* v. *Kampiles* (N.D. Ind. Crim. No. HCR 78-77).

[2] *U.S.* v. *L. Patrick Gray III, W. Mark Felt* and *Edward S. Miller* (D.D.C. Crim. No. 78-000179).

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In the course of these prosecutions, both the defense and the government may seek to introduce classified information as an important part of their respective cases. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of trial.

Arguments on both sides of the relevance question could take place in open court. Obviously, during such an exchange, sensitive information could be disclosed, even if the ultimate determination is made that the evidence is neither relevant nor admissible.

The government, which has the dual responsibility of prosecuting violations of federal criminal laws and protecting national security secrets, must often guess, in advance of trial, whether the defendant will seek to disclose certain classified information and whether it will be found admissible. It must also speculate on how much will be disclosed and thus how much harm may be done to the national security before a ruling on the use of the information can be obtained.

Where the government expects to disclose some classified material in presenting its own case, the same assessment must be made. Thus, all of the sensitive materials that *might* be disclosed at trial must be weighed in deciding whether to proceed with the prosecution.

Depending on the nature of the information at issue and the extent to which it may already have been compromised, the government may be confronted with the dilemma of accepting the disclosure of the sensitive information or dismissing the prosecution.

In the past, the government has foregone prosecution of some cases in order to avoid compromising national security information.[3] The costs of such decisions are great. In the words of Assistant Attorney General Philip Heymann

> the costs . . . go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technical secrets have a broad *de facto* immunity from prosecution. . . . This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.[4]

Perhaps even more damaging than the decision not to prosecute in the first place may be the government's decision to dismiss a case in mid-trial, when confronted either with the unanticipated introduction of sensitive material or with potentially inadequate mechanisms for minimizing disclosure.[5]

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[3] See testimony of Assistant Attorney General Philip B. Heymann, U.S. Department of Justice, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Apr. 24, 1980.

[4] Assistant Attorney General Philip B. Heymann, Graymail legislation: Hearings before the Subcommittee on Legislation of the House Permanent Select Committee on Intelligence, 96th Congress, 1st Session, Aug. 7 and Sept. 20, 1979, p. 5. (hereinafter Graymail legislation: Hearings before. . . .)

[5] See e.g. *U.S. v. Berrellez, supra.* The government sought and was granted permission to dismiss the indictment in this espionage case in the midst of pre-trial proceedings. The district judge had denied the government's motion for a protective order establishing a prospective procedure requiring advance notice and a pre-disclosure determination of relevance. Subsequently, newspapers articles appeared in major U.S. newspapers suggesting that because the reason for the dismissal was that the information was embarrassing, rather than vital to the national security. (See e.g. Charles Mohr, New York Times, p. A1, Feb. 9, 1979).

While these problems arise in the context of a relatively small number of cases, the cases are often highly visible and of considerable public importance.[6] Experience has led to the conclusion that the creation of uniform procedures for resolving issues regarding classified information would be useful in establishing a balance between the public interest in vigorous enforcement of our criminal laws on the one hand and the constitutional right to a fair trial on the other.

H.R. 4736 establishes those procedures. For the most part, the bill describes techniques already available to the courts and often utilized in the past. It is not intended to infringe on a defendant's right to a fair trial or to change the existing rules of evidence and criminal procedure. Rather it is intended to provide uniformity, rationality and consistency to the present system. It is intended in so far as possible to eliminate guesswork and speculation from the government's decision making process. It will enable the government, the defendant and the court to focus on the merits of the case rather than on procedural problems that now consume vast amounts of time and resources.[7]

The disclose or dismiss dilemma can never be eliminated entirely. Inherent in every espionage trial for example, is the principle set out in innumerable court decisions[8] that when the government chooses to prosecute an individual for a crime, it cannot deny to him the right to meet the case against him by introducing relevant documents, even those otherwise privileged. The government must decide whether the public prejudice of allowing the crime to go unpunished is greater than the disclosure of those state secrets which might be relevant to the defense. Such disclosures include evidence the prosecution may wish to introduce against an accused as well as the accused's right to put in evidence on his own behalf.[9]

Thus in virtually every criminal prosecution involving classified information the government must make this choice. However, the elements of surprise and uncertainty can be eliminated from the outset by requiring advance notice of the defendant's intention to introduce classified information. Hearings on admissibility can be held *in camera* so that classified information that is not admissible need not be disclosed publicly. Once admissibility has been determined, alternatives can be fashioned to minimize the possible harm resulting from disclosure.

H.R. 4736 is designed to accomplish these goals. It is the Committee's judgment that this legislation is worthwhile in that it expresses a clear congressional intent that the courts must give these cases and the issues they raise careful and methodical treatment in accordance with a clearly defined process.

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[6] See e.g. *U.S.* v. *Berrellez, supra,* raising questions regarding CIA involvement in the internal political affairs of Chile and *U.S.* v. *Felt, Gray, Miller, supra,* alleging unlawful conduct on the part of former high-ranking FBI officials.

[7] See testimony of Michael E. Tigar, Esq., before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 13 ,1980.

[8] See, e.g. *U.S.* v. *Andolschek,* 142 F.2d 503 (2d Cir. 19); *U.S.* v. *Coplon,* 185 F.2d 629 (2d Cir. 1950).

[9] *U.S.* v. *Coplon,* 185 F.2d at 238.

History of the Bill

H.R. 4736 was introduced on July 11, 1979, by members of the House Permanent Select Committee on Intelligence. Although the bill was the product of hearings and deliberation of that Committee, the bill was referred jointly to the House Judiciary Committee because of the bill's potential impact on the rules of evidence and criminal procedure which fall within the Judiciary Committee's jurisdiction, as well as the bill's implications for the guarantees of the 6th Amendment to the Constitution.[10]

On February 12, 1980 after several hearings and intensive deliberation between the Intelligence Committee, the Justice Department, the defense bar and other interested individuals and groups, the House Permanent Select Committee on Intelligence favorably reported H.R. 4736, as amended. The bill was ordered reported by unanimous voice vote of the Committee.[11]

The bill, as reported by the House Permanent Select Committee on Intelligence, was the subject of separate hearings in the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on April 24 and May 13, 1980. Testimony was heard from the Justice Department, the intelligence community, civil liberties groups and the defense bar. All of the witnesses expressed support for the legislation. In addition, the Subcommittee received the views of other interested individuals and organizations such as the American Bar Association and the Administrative Office of the U.S. Courts, again expressing support for the principal provisions of the legislation.

Based on this record, as well as on the work of the House Permanent Select Committee on Intelligence, the Subcommittee on Civil and Constitutional Rights met on June 13, 1980 to consider H.R. 4736. The vehicle for mark-up was H.R. 4736, as reported by the House Permanent Select Committee on Intelligence. By a unanimous voice vote, the bill was ordered reported to the full committee.

On July 22, 1980, the Committee met to consider H.R. 4736, as amended, made further amendment thereto and, a quorum being present, ordered the bill, as amended, reported to the House by unanimous voice vote.

Explanation of Amendment

The Committee adopted a single amendment to the Intelligence Committee's amendment in the nature of a substitute. The amendment adds the House and Senate Judiciary Committees to the Committees to whom the Attorney General must report regarding the effect and operation of the legislation under section 202 of the bill. The bill as reported by the House Permanent Select Committee on Intelligence required such reporting only to the House and Senate on Intelligence

[10] The Sixth Amendment reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

[11] For a more detailed description of the evolution and history of the bill, see Report No. 96-831, Part 1.

Committees. Because the bill involves important issues of criminal procedure and constitutional law, which are the special province and responsibility of the House Committee on the Judiciary, the Committee felt that it should maintain an active role in overseeing the impact of the legislation. The Committee's amendment helps the Committee accomplish that result. The amendment was adopted by voice vote, with one dissenting voice.

Summary of Legislation and Discussion of Committee Consideration

A detailed section-by-section analysis appears elsewhere in this report.[12] The Judiciary Committee's endorsement of H.R. 4736 reflects its judgment that the Intelligence Committee weighed carefully the competing interests at stake in this legislation and achieved the proper balance between them. The Committee felt no need to independently scrutinize every provision of the bill. However, during the Committee's consideration of the bill, several provisions emerged as deserving of the Committee's closer attention. In one case a separate committee amendment was judged to be necessary.

Reporting Requirement

Section 202 of the bill, as reported by the Intelligence Committee contained a requirement that the Attorney General report to the House and Senate Committees on Intelligence on an annual basis regarding "the operation and effectiveness of this bill." The reports are to include summaries of those cases not prosecuted because of the possibility that classified information would be disclosed. Because this bill has a criminal justice dimension equal in importance to its national security dimension, requiring its referral to the Committee on the Judiciary in the first place, the Committee is convinced that its responsibility for the legislation should go beyond its initial consideration. The Committee believes it should share equally in the burden of oversight with the Intelligence Committee. Because the Committee felt it had an important role to play in the continued and systematic congressional monitoring of the effectiveness of the legislation, it was the Committee's judgment that it should be added to the Committees to which the Attorney General must report.

The Executive Branch has stressed its need for this legislation on the basis that certain kinds of criminal prosecutions were not being brought because of lack of adequate procedures for protecting national security information.[13] This bill attempts to provide those procedures. It is the Committee's view in adopting the Committee amendment that the relevant oversight Committees be in a position to know if the legislation is working to achieve the goals it was designed to achieve.

It is not the Committee's intent to interfere with prosecutorial discretion. As in the case of prior notice to the Intelligence Committees concerning covert operations, it is not the Committee's purpose that

[12] See Report 96-831, Part 1, Classified Information Criminal Trial Procedures Act, to accompany H.R. 4736, Mar. 18, 1980, pp. 12-32.

[13] Testimony of Assistant Attorney General Philip B. Heymann before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Apr. 24, 1980.

the Executive Branch seek the approval or disapproval of the Legislative Branch in adhering to a reporting requirement. The purpose of the requirement is merely to enable the Committee to learn on a regular, systematic basis the information necessary to conduct its oversight function.

Nor is it the Committee's intent to increase the potential for disclosure of classified information by emphasizing its role in the oversight process. Indeed the Committee does not believe such reports necessarily require the inclusion of classified information at all. The Attorney General has in the past prepared reports for general public release which the Committee cites as examples of the type of reports which may satisfy the section 202 requirement without risking exposure of classified information.[14]

The Committee emphasizes that this provision of the bill is designed merely to facilitate the oversight process, not to be an exclusion expression of or substitute for it. Given the small number of cases apt to be involved,[15] the Committee does not believe that this requirement unduly burdens the Attorney General.

Alternative Procedure for Disclosure

Another important aspect of the bill which came under scrutiny is the section 103 provision permitting, under certain circumstances, the substitution of summaries or admissions for the specific classified information at issue, once the information has been held relevant and admissible. During the Subcommittee hearings on the bill, two concerns regarding this provision were expressed. The first was that permitting any use of summaries works a hardship on the defense. The argument was made that if evidence is relevant and admissible, the jury ought to hear it just as it hears any other relevant and admissible evidence, in its totality.[16] To do otherwise might adversely affect the defendant's case.

The Committee recognizes the risk inherent in even a discretionary use of summaries as in section 103. By ratifying this provision of the bill, the Committee does not mean to suggest that any hardship to the defense should be permitted. Indeed the language of this section makes it clear that the court is to grant the government's motion for a substitution only "if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." It is the Committee's intent that there be no impairment of either the defendant's ability to present his case or his right to a fair trial as a result of the operation of this section.

The second concern, related to first, is that government-triggered proceeding under section 102(c) could result in the admission of sum-

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[14] See, e.g. Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions with Respect to Ceneral Intelligence Agency Mail Opening Activities in the United States, Jan. 14, 1977, reprinted in Report No. 96–280, Justice Department Handling of Cases Involving Classified Data and Claims of National Security, Second Report by the Committee on Government Operations (June 18, 1979). (*See also* Press Conference of the Honorable Griffin B. Bell, Attorney General of the United States, and the Honorable Benjamin R. Civiletti, Assistant Attorney General, Criminal Division with members of the Press, Washington, D.C. Nov. 1, 1977, regarding Justice Department investigation of CIA Director Richard Helms.)

[15] Testimony of Philip B. Heymann before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Apr. 24, 1980.

[16] Testimony of Michael E. Tigar, Esq., before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 13, 1980.

maries or substitutions of materials the defense in fact never had complete access to.

It was suggested at the Subcommittee's hearing that this could happen if the government referred to the classified information at issue only by generic category, as is permitted under section 102(c), and then moved to substitute a summary for the classified information under section 103. This possibility prompted considerable discussion at the Subcommittee hearings [17] and resulted in an inquiry [18] to the Intelligence Committee as to that Committee's understanding of the exact meaning of section 103 as the principal drafters of that provision. The Intelligence Committee's response, with which the Judiciary Committee concurs, was that "it is not the intent of the . . . Committee to authorize, nor . . . would the bill permit" [19] the result suggested during the Subcommittee hearings.

The purpose of a proceeding under section 102 is to determine prior to trial the admissibility, at trial, of classified information already in the possession of the defendant. This is the case, whether the proceeding is triggered by the defendant's giving notice to the government of its intent to use classified information, or by the government's own initiation of a proceeding. The information in the possession of the defendant may have been supplied to the defendant by the government pursuant to a pre-trial discovery request, or it may have been acquired by the defendant from some other source.

To facilitate the arguments as to the admissibility of such information, section 102(c) requires the government to give notice, prior to the proceeding, of the classified information at issue. If the classified information the defendant possesses was given to him by the government, the government will have already confirmed its sensitivity; therefore, the required notice can be specific, as is mandated by section 102(c). However, if the sensitive information at issue was obtained by the defendant from a non-government source, then the government is not required to confirm its accuracy or to expand the defendant's knowledge of classified information, and the required notice can by generic category. This is all that is contemplated by section 102(c).

The purpose of a section 103 proceeding is to determine if the evidence found to be admissible at a section 102 hearing may be introduced in a summary form. Since the evidence at issue in section 102 is necessarily material already in the possession of the defendant, in no case does the legislation encompass classified information to which the defense has not had access.

Considerable attention was devoted to this provision. No infringement on the defendant's ability to make his case is intended. Indeed, it is the Committee's intent that all hearings conducted under section 102 and 103 of the bill will be fully adversary and will be concerned only with information to which the defendant has had complete access.

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[17] See testimony of Michael E. Tigar, Esq., and Morton Halperin, Director, Center for National Security Studies, before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 13, 1980.

[18] Letter dated June 12, 1980 from the Honorable Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, to the Honorable Edward P. Boland, Chairman, House Permanent Select Committee on Intelligence.

[19] Letter dated June 12, 1980 from the Honorable Edward P. Boland, Chairman, House Permanent Select Committee on Intelligence, to the Honorable Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary.

Rules on Access and Security

Section 110 requires the Chief Justice of the United States, in consultation with the Attorney General and the Director of Central Intelligence, to establish security procedures for classified information in the custody of the courts as a result of proceedings under this legislation. Concern was expressed during the Committee's consideration of H.R. 4736 that this procedure represented a significant departure from the normal method of proposing rules and procedures for the U.S. district courts.[20] Normally, such rules are proposed by the Supreme Court and submitted to Congress. It was suggested that for the Attorney General and the CIA Director to have a role in this process was inappropriate, as was the exclusion from the process of the other justices of the Supreme Court. The Committee would have serious reservations about departing from the procedure routinely followed if it understood the rules at issue to be of a substantive nature, as for example, the Rules of Criminal Procedure. However, the Committee understands the rules contemplated in section 110 to be housekeeping rules: where safes are to be located, who is to have the combinations, how many court employees can have access to the documents, and the like. The physical security of documents is the focus of this section and, on that basis, the Committee has no reservation about placing the responsibility for assuring that security in the three individuals named in section 110.

Congressional Budget Act

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 28, 1980.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 4736, the Classified Information Criminal Trial Procedures Act, as ordered reported by the House Committee on the Judiciary, July 22, 1980.

The bill establishes new court procedures for Federal criminal cases involving classified information. It requires a defendant to notify the court and the attorney for the United States of any intention to disclose classified information, whereupon the United States is authorized to request the court to conduct a proceeding (which may be held privately) with the right of appeal to discuss the use, relevance and/or admissibility of the information in question. The bill provides for alternatives to full disclosure, such as a summary or statement of facts, if the value of the information to the defense is not substantially altered. If the court denies a motion regarding the use of these alternatives, the Attorney General may object with explanation by filing an affidavit certifying that full disclosure would cause identifiable dam-

[20] See testimony of Michael E. Tigar, Esq. and Morton Halperin before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, May 13, 1980. See also letter dated June 2, 1980, from William E. Foley, Executive Director, Administrative Office of the U.S. Courts to Congressman Don Edwards.

age to the national security of the United States. The court is then required to order the defendant not to disclose the information and dismiss the case or testimony or part of the case or testimony, depending on the situation. The Attorney General is required to report annually on the operation and effectiveness of the Act.

The provisions of this bill are not expected to add significantly to the burdens of the judicial system and thus it is expected that no significant additional cost to the Government will be incurred as a result of enactment of this bill.

Sincerely,

ALICE M. RIVLIN, *Director.*

OVERSIGHT FINDINGS

Pursuant to clause 2(1)(3)(A) of Rule XI of the Rules of the House, the Committee makes no oversight findings at this time. The Committee approached its inquiry into H.R. 4736 primarily as a legislative inquiry. Once enacted, however, this legislation will create new oversight responsibilities for the Committee in the criminal justice area. The Committee plans to exercise that responsibility carefully and thoroughly.

EXECUTIVE BRANCH ESTIMATE

The Committee has not received any cost estimates from the Executive Branch and is therefore unable to compare the Executive Branch costs to its own estimate pursuant to clause 7(a)(2) of Rule XIII of the Rules of the House.

RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

The Committee had not received a report from the Committee on Government Operations pursuant to clase 2(1)(3)(D) of Rule XI of the Rules of the House as of the time of the filing of this report.

INFLATION IMPACT STATEMENT

Pursuant to clause 2(1)(4) of Rule XI of the Rules of the House, the Committee has examined H.R. 4736 to determine if it will have inflationary impact on the national economy. Consistent with the Committee's determinations as to the cost of H.R. 4736, the Committee finds that enactment of H.R. 4736 will have no effect on the national economy.

CHANGES IN EXISTING LAW

Pursuant to clause 3 of Rule XIII of the Rules of the House the Committee notes that the bill makes no changes to existing law.

FIVE YEAR COST PROJECTION

Pursuant to clause 7(a)(1) of Rule XIII of the Rules of the House, the Committee has determined that no additional costs will be incurred by the Government in the administration of H.R. 4736.

CONGRESSIONAL BUDGET ACT

Pursuant to clause 2(1)(3)(B), the Committee notes that this legislation does not provide for new budget authority or tax expenditures.

SUPPLEMENTAL VIEWS OF HON. M. CALDWELL BUTLER TO H.R. 4736

Section 202 of this bill requires that the Attorney General annually report on the progress of cases brought under this Act to both the Permanent Select Committees of the House and Senate and the Judiciary Committees on both bodies. It seems to us that recent years have seen too much movement toward the issuance of reports to Congressional committees. They are rarely used, cost the taxpayer immense sums of money, and, we fear, inhibit the flexibility of Executive departments and agencies in carrying out their responsibilities. The reporting requirements contained in this legislation are symptomatic of the problem.

H.R. 4736 was drafter for the purpose of processing extremely important and sensitive confidential, classified information through the court system. Under its provisions, a federal judge will be empowered to review classified information subpoenaed for trial and determine, *in camera*, whether that material should or should not be disclosed to the public. Any decision to reveal the classified information will be subject to an interlocutory appeal by the government.

Having said that, we create additional language which requires the Department of Justice to report to four committees of the Congress relative to the "operation and effectiveness of this Act." Since Rule XLVIII of the House governs the composition of the Permanent Select Committee on Intelligence and requires that its membership include at least one Member from the Judiciary Committee (there are now three), we are inclined to believe the interests of the Committee and of the American people are satisfactorily represented and that further public discussion of classified issues is absolutely unnecessary.

We see no reason for another set of reports to people who already have access to the information in question and will urge rejection of the amendment which requires special reports to members of our Committee.

M. CALDWELL BUTLER.
ROBERT MCCLORY.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.

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